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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA)

17 Plaintiff,)

18 v.)

19 FEDEX CORPORATION,)
FEDERAL EXPRESS CORPORATION,)
20 (A/K/A FEDEX EXPRESS))
FEDEX CORPORATE SERVICES, INC.,)

21 Defendants.)
22

CR No. 14-380 CRB

UNITED STATES' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE INDICTMENT

Hearing Date: May 13, 2015

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Court: Hon. Charles R. Breyer

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I. INTRODUCTION

In their Motion to Dismiss the Indictment, the defendants argue that they cannot be prosecuted for the conduct described in the superseding indictment because, in their view, Congress exempted common carriers from any criminal liability arising from their transportation and delivery of illegal drugs. According to the defendants, these exemptions give them and other common carriers carte blanche to knowingly and intentionally distribute illegal drugs; to conspire with others to distribute illegal drugs; and to conspire to launder the proceeds of illegal drug activity. In other words, the defendants believe that they could conspire with a Mexican drug cartel to deliver cocaine to customers around the United States, and the United States would be unable to prosecute them for this conduct. Such a broad exemption from the federal drug laws would be unprecedented, and the defendants identify no court that has recognized a carve-out of this scope and magnitude. The absence of support for the defendants' position is understandable because their proposed exemptions are inconsistent with the text, structure, purpose, and legislative history of the relevant criminal statutes.

The defendants ask the Court to dismiss most of the claims in the superseding indictment based on a purported exemption in 21 U.S.C. § 822(c), which provides that certain persons, including common carriers who possess controlled substances in the usual course of their business, are excepted from the registration requirements of the Controlled Substances Act (CSA), 21 U.S.C. § 841, *et seq.* According to the defendants, however, Section 822(c) is not only a registration exception but also creates a broad exemption from any and all criminal liability under the CSA because it provides that the persons described in the exception "may lawfully possess any controlled substance . . . under this subchapter." But this language does not mean what the defendants claim. Indeed, the Supreme Court, the Ninth Circuit, and at least one other court of appeals have rejected similar interpretations of Section 822, holding instead that Section 822 authorizes only conduct that is otherwise lawful under the CSA. As these courts concluded, interpreting Section 822 in the way the defendants suggest would thwart the core purposes of the CSA and undermine Congress's intent to punish drug transactions that occur outside legitimate distribution channels. The defendants' interpretation is also inconsistent with the text and structure of the CSA.

1 But even if Section 822(c) did create a broad exemption from criminal liability, the defendants
2 still would not be entitled to dismissal because this provision does not apply to their conduct in this case.
3 By its terms, Section 822(c) applies only to common carriers who possess a controlled substance in the
4 usual course of business, and the superseding indictment alleges that the defendants' conduct in this case
5 was outside "the usual course of business" and constituted a departure from the defendants' "usual
6 business practices." These allegations, which the Court must accept as true for purposes of this motion,
7 demonstrate that Section 822(c) does not apply to the defendants on the face of the indictment. The
8 defendants attempt to avoid this result by arguing that, as a matter of law, a common carrier always acts
9 in the usual course of business when it transports and delivers packages for the general public, even if it
10 knows that those packages contain illegal drugs, but they offer no meaningful support for this position.
11 Indeed, the courts that have interpreted Section 822(c) have concluded that "the usual course of
12 business" includes only acts within the legitimate distribution chain of a controlled substance, a
13 description that does not apply to the defendants' conduct here.

14 In addition, Section 822(c) provides only that certain unregistered persons may "lawfully
15 possess" controlled substances; it does not provide that they may distribute them, conspire to distribute
16 them, or launder the proceeds of any illegal distribution. Accordingly, even if Section 822(c) did
17 constitute an exemption from criminal liability, this exemption would apply only to possession and
18 would not shield the defendants from prosecution for the charges in the indictment. Furthermore, the
19 conspiracy charges in the indictment allege that the defendants conspired to facilitate Internet
20 pharmacies' unlawful distribution of controlled substances and to launder the proceeds of such conduct.
21 Even if Section 822(c) somehow authorizes the defendants to engage in illegal drug distribution
22 themselves, it plainly does not authorize the defendants to conspire to facilitate the illegal drug
23 distribution of others.

24 The defendants also ask the Court to dismiss Counts 11 and 16 of the superseding indictment
25 based on 21 U.S.C. § 373(a), a provision in the Food Drug and Cosmetics Act ("FDCA"), 21 U.S.C.
26 § 331, *et seq.*, that provides that "carriers shall not be subject to the other provisions of this chapter by
27 reason of their receipt, carriage, holding, or delivery of . . . drugs . . . in the usual course of business as
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carriers.” But the defendants identify no court that has concluded that this provision exempts common carriers from all criminal liability under the FDCA. Furthermore, as with Section 822(c), Section 373(a) applies only to common carriers who are acting in the usual course of business, and the superseding indictment sufficiently alleges that the defendants’ conduct here places them outside that category. Likewise, any exemption in Section 373(a) would not allow the defendants to escape criminal liability for conspiring to facilitate Internet pharmacies’ distribution of misbranded drugs, which is the basis for the charges in Counts 11 and 16.

Finally, there is no merit to the defendants’ claim that the superseding indictment must be dismissed because the CSA and FDCA did not give them fair warning that their conduct was criminal. These statutes are unambiguous as applied to the defendants’ conduct and therefore gave them sufficient notice that they could be prosecuted for the offenses described in the indictment. Indeed, it should not come as a shock to the defendants to learn that they may be criminally liable for knowingly and intentionally distributing illegal drugs on behalf of their customers or for conspiring to engage in this conduct.

For all these reasons, the Court should deny the defendants’ motion to dismiss in its entirety.

II. BACKGROUND

On August 13, 2014, a grand jury sitting in the Northern District of California returned an 18-count superseding indictment charging FedEx Corporation and two of its operating companies, Federal Express Corporation (also known as FedEx Express) and FedEx Corporate Services, Inc., with violating and/or conspiring to violate federal laws prohibiting the unlawful distribution of controlled substances, in violation of the CSA, and misbranded drugs, in violation of the FDCA. Clerk’s Record (“CR”) 28 (hereinafter “Super. Ind.”). Counts 1 and 13 charged these defendants with conspiring to distribute and to possess with intent to distribute controlled substances in violation of, *inter alia*, 21 U.S.C. §§ 841(a)(1), all in violation of 21 U.S.C. § 846. *Id.* ¶¶ 22-40, 70-87. Counts 2 through 10, 14, and 15 charged the defendants with possessing with intent to distribute and distributing controlled substances, in violation of, *inter alia*, 21 U.S.C. § 841(a)(1). *Id.* ¶¶ 41-42, 88-89. Counts 11 and 16 charged the defendants with conspiring to distribute and dispense misbranded drugs in violation of 21 U.S.C.

1 §§ 331(k), 333(a)(1), (a)(2), and 353(b), all in violation of 18 U.S.C. § 371. *Id.* ¶¶ 43-61, 90-106.
2 Counts 12, 17, and 18 charged the defendants with conspiring to launder money that was the proceeds of
3 possession with intent to distribute and distribution of controlled substances in violation of, *inter alia*, 21
4 U.S.C. §§ 841(a), 841(b), and 846, all in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (h). *Id.* ¶¶ 62-69,
5 107-120.

6 The superseding indictment contained 126 paragraphs of allegations, including 21 introductory
7 paragraphs that summarized the conduct underlying these charges. Super Ind. ¶¶ 1-21. Among other
8 things, these introductory paragraphs alleged that the defendants shipped controlled substances and
9 prescription drugs for two illegal Internet pharmacy organizations and that they did so knowing that
10 these pharmacies were distributing drugs outside the usual course of professional practice and not for a
11 legitimate medical purpose. *Id.* ¶¶ 4-7. These introductory paragraphs further alleged that the
12 defendants enacted several internal policies and procedures that applied only to Internet pharmacies and
13 that these policies were designed to allow the defendants to continue to ship controlled substances and
14 prescription drugs for illegal Internet pharmacies while protecting against lost revenue and addressing
15 employee compensation and safety issues. *Id.* ¶¶ 8-21. Each count of the indictment incorporated the
16 allegations in these introductory paragraphs by reference. *Id.* ¶¶ 22, 41, 43, 62, 70, 88, 90, 107, 114.

17 The superseding indictment further described the manner and means by which each of the
18 charged conspiracies operated, including specific allegations regarding the role the defendants played.
19 Super. Ind. ¶¶ 24-40, 45-61, 64-69, 72-87, 92-106, 109-113, 116-120. The “manner and means”
20 sections for the CSA conspiracies charged in Counts 1 and 13 each included allegations that the
21 defendants “did not ship contraband, including illegal drugs, in the usual course of business” and that the
22 defendants “departed from [their] usual business practices” to participate in and facilitate the illegal
23 Internet pharmacies’ unlawful sale of controlled substances. *Id.* ¶¶ 39, 84. The other counts in the
24 superseding indictment incorporated these allegations by reference. *Id.* ¶¶ 41, 43, 62 (incorporating
25 Count 1 allegations into Counts 2 through 12); *id.* ¶¶ 88, 90, 107, 114 (incorporating Count 13
26 allegations into Counts 14 through 18).

III. DISCUSSION

A. Legal Standards.

In their motion to dismiss, the defendants principally contend that the superseding indictment is defective on its face because the conduct described in the indictment is not a crime under the CSA or FDCA. *See* Def. Mot. 3, 10-35. The defendants also argue in the alternative that the Court should dismiss the indictment because the CSA and FDCA did not give the defendants fair warning that their conduct was criminal. *See id.* at 3-4, 11, 35-39. According to the defendants, each of these claims raises “a pure question of law” based on the allegations in the indictment. *Id.* at 10; *see id.* at 11. Accordingly, in ruling on the defendants’ motion, this Court is bound by the four corners of the indictment and must accept the truth of its allegations in analyzing whether a cognizable offense has been charged. *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014). Put differently, “[a] motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence,” and “[t]he Court should not consider evidence not appearing on the face of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

Both of the defendants’ dismissal claims require the Court to interpret provisions of the CSA and FDCA. In addressing questions of statutory interpretation, the Court’s inquiry begins with the text of the statute. *United States v. Kristic*, 558 F.3d 1010, 1013 (9th Cir. 2009). “[T]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *United States v. Sioux*, 362 F.3d 1241, 1245 (9th Cir. 2004) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). When a statute’s terms are ambiguous, the Court may look to other sources to determine congressional intent, such as the canons of construction and the statute’s legislative history. *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008). The Court may also consider related statutes because “statutes dealing with similar subjects should be interpreted harmoniously.” *Id.* At the end of this interpretation process, the Court may apply the rule of lenity, which requires that ambiguous criminal statutes be construed in favor of the accused, only “if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess at what Congress

intended.” *United States v. Backlund*, 689 F.3d 986, 997-98 (9th Cir. 2012). The rule of lenity “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.” *United States v. Lanier*, 520 U.S. 259, 266 (1997).

B. The CSA Counts (Counts 1-10 & 13-15) Properly State Offenses Under the CSA.

1. Section 822(c) does not exempt common carriers from the CSA’s prohibitions.

The CSA imposes certain registration requirements on every person who manufactures, distributes, dispenses, or proposes to manufacture, distribute, or dispense any controlled substance. 21 U.S.C. §§ 822(a), 823. Under Section 822(b), persons who register under the CSA “are authorized to possess, manufacture, distribute, or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of [the CSA].” 21 U.S.C. § 822(b). Section 822(c), titled “Exceptions,” further provides:

The following persons shall not be required to register and may lawfully possess any controlled substances or list I chemical under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance or list I chemical if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment.”

(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title.

21 U.S.C. § 822(c). The effect of this provision is to exempt certain categories of persons from the CSA’s registration requirements.

Section 822(c) also states that, despite their unregistered status, the categories of persons described in that provision “may lawfully possess any controlled substances . . . under this subchapter.” Read in isolation, this phrase seems susceptible to two different interpretations. Under the first interpretation, this language clarifies that certain unregistered persons may possess controlled substances to the extent that such possession is otherwise lawful under the CSA. Under the second interpretation, which the defendants press in their motion to dismiss, this language authorizes these unregistered persons to possess controlled substances in any and all circumstances, even if such possession would

1 otherwise be unlawful under the CSA. Although both of these interpretations may seem plausible in a
2 vacuum, only the first is consistent with the text and structure of the CSA, Congress’s goals in enacting
3 the statute, and the cases interpreting Section 822, including the Supreme Court’s decision in *United*
4 *States v. Moore*, 423 U.S. 122 (1975). Read in the light of these considerations, Section 822(c) is
5 unambiguous, and the Court should therefore reject the defendants’ contention that this provision
6 exempts them from prosecution under the CSA.

7 a. *Section 822(c) is an exemption from the CSA’s registration requirements, not a*
8 *provision that authorizes common carriers and other unregistered persons to*
 engage in conduct that would otherwise be criminal under the CSA.

9 The defendants are not the first to argue that Section 822, titled “Persons required to register,”
10 creates broad exemptions from criminal liability, but courts have consistently rejected similar claims
11 under both Section 822(b) and Section 822(c).¹ Perhaps most notably, in *Moore*, the Supreme Court
12 rejected a registered physician’s contention that Section 822(b) authorized his illegitimate distribution of
13 controlled substances and therefore exempted him from prosecution under 21 U.S.C. § 841. *See* 423
14 U.S. at 124, 131-33. The Court disagreed with the physician’s reading of the statute, holding that
15 Section 822(b) did not amount to “a blanket authorization of all acts by certain persons.” *Id.* at 131. In
16 support of this conclusion, the Court explained that the physician’s proposed construction of Section
17 822(b) “would constitute a sharp departure from prior laws” and that “there is no indication that
18 Congress had any such intent.” *Id.* at 132. The Court concluded instead that Congress had added
19 Section 822(b) to the CSA “merely to ensure that persons engaged in lawful activities could not be
20 prosecuted.” *Id.* at 133. Indeed, the Court found that the legislative history of the CSA revealed that
21 “Congress was concerned with the nature of the drug transaction, rather than with the status of the
22 defendant” and intended the CSA’s penalties “to turn on whether the ‘transaction’ falls within or without
23 legitimate channels.” *Id.* at 134, 135.

24 In short, *Moore* holds that Section 822(b) does not give CSA registrants carte blanche to
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26 ¹ In other cases, defendants have made the same arguments about Section 822(b) that the
27 defendants now make about Section 822(c), claiming that it authorizes them engage in conduct that
28 would otherwise be unlawful under the CSA. *See, e.g., Moore*, 423 U.S. at 131-33. Because Section
822(b) and Section 822(c) therefore present overlapping questions of interpretation, the Court may and
should consider cases construing Section 822(b) when determining the meaning of Section 822(c).

1 distribute controlled substances, but rather provides “a qualified authorization” to engage in certain
2 legitimate, lawful activities. 423 U.S. at 131. This result is unavoidable, as the contrary interpretation
3 could allow any CSA registrant, including a pharmacy or wholesaler, to knowingly distribute illegal
4 drugs without fear of prosecution. *See id.* at 143 (noting that physician’s interpretation of the CSA
5 would exempt any registered manufacturer, wholesaler, and pharmacist from prosecution under 21
6 U.S.C. § 841). Accordingly, under *Moore*, CSA registrants “are still subject to criminal prosecution
7 ‘when their activities fall outside the usual course of professional practice.’” *United States v. Feingold*,
8 454 F.3d 1001, 1003 (9th Cir. 2006) (quoting *Moore*, 423 U.S. at 124) (upholding Section 841(a)
9 conviction of registered doctor who issued prescriptions with disregard for proper prescribing practices);
10 *see also United States v. Boettjer*, 569 F.2d 1078, 1079 (9th Cir. 1978) (upholding Section 841(a)
11 convictions of registered physician based on prescriptions that “were not issued for legitimate medical
12 purposes”).

13 *Moore*’s reasoning applies equally to the unregistered persons described in Section 822(c). As
14 the Supreme Court explained in *Moore*, Congress did not intend the CSA to create a system where
15 criminal penalties depend on “the status of the defendant” – *e.g.*, whether he was a registrant or a person
16 exempted from registration requirements. *See Moore*, 423 U.S. at 134-35; *United States v. Rosenberg*,
17 515 F.2d 190, 195 (9th Cir. 1975) (holding that 21 U.S.C. § 841 applies “to all persons” and noting that
18 “[w]henever Congress wanted to limit the scope of a provision’s coverage it specifically so indicated”).
19 Rather, Congress intended to protect lawful activities from prosecution but punish drug transactions that
20 occurred outside legitimate channels. *See Moore*, 423 U.S. at 134-35. Accordingly, Section 822(c), like
21 Section 822(b), cannot constitute “a blanket authorization of all acts by certain persons” because that
22 result “would constitute a sharp departure from prior laws,” and “there is no indication that Congress
23 had any such intent.” *Id.* at 131, 132.

24 The language of Section 822(c) confirms this conclusion. Although the defendants’ brief focuses
25 on Section 822(c)’s application to common carriers, Section 822(c) sweeps more broadly and provides
26 that two other categories of unregistered persons “may lawfully possess” controlled substances:
27 (1) agents and employees of CSA registrants, provided that the agents and employees are acting in the
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1 usual course of their business or employment, 21 U.S.C. § 822(c)(1); and (2) any “ultimate user” who
2 possesses a controlled substance “for his own use or for the use of a member of his household or for an
3 animal owned by him or by a member of his household.”² 21 U.S.C. §§ 822(c)(3), 802(27) (defining
4 “ultimate user”).

5 The first category, which encompasses persons acting on behalf of CSA registrants, is
6 particularly helpful in construing Section 822(c) because it reveals that Congress intended any
7 possession exemption in Section 822(c) to be no broader than the parallel possession exemption in
8 Section 822(b). Specifically, in enacting Section 822(c)(1), Congress understandably concluded that the
9 agents and employees of CSA registrants should not be required to separately register under the CSA for
10 work they undertook on behalf of CSA registrants, but Congress undoubtedly did not intend to authorize
11 these agents and employees to engage in conduct that would have been off-limits to the registrants for
12 whom they worked. Accordingly, because Section 822(b) exempts only the lawful activities of CSA
13 registrants from prosecution, *see Moore*, 423 U.S. at 133, any exemption in Section 822(c) must
14 similarly apply only to lawful acts of possession. Otherwise, CSA registrants could circumvent the
15 CSA’s prohibitions by delegating illegal activity to their unregistered agents and employees.

16 Consistent with this analysis, the Ninth Circuit has rejected the contention that a defendant who
17 is exempted from registration requirements under Section 822(c)(1) is thereby “authorized to possess
18 controlled substances and thus should be free from prosecution under § 841.” *United States v. Goldfine*,
19 538 F.2d 815, 819-20 (9th Cir. 1976) (discussing *Moore*). Likewise, in *United States v. Hill*, 589 F.2d
20 1344 (8th Cir. 1979), the Eighth Circuit specifically addressed and rejected a defendant’s claim that
21 Section 822(c) exempted him from criminal liability under 21 U.S.C. § 841. *Id.* at 1350. In that case,
22 the defendant was a sales representative for a pharmaceutical company who took advantage of his
23

24 ² Section 822(c)(3) states that the persons exempted from the CSA’s registration requirements
25 include “[a]n ultimate user who possesses [a controlled substance or list I chemical] for a purpose
26 specified in section 802(25) of this title.” *Id.* Section 802(25) originally contained a definition for
27 “ultimate user” but was redesignated 802(26) by Pub. L. 98-473, § 507(a), Oct. 12, 1984, 98 Stat. 2071,
and was further redesignated 802(27) by Pub. L. 99-570, Title I, § 1003(b)(2), Oct. 27, 1986, 100 Stat.
3207-6, without amending 21 U.S.C. § 822(c)(3) to conform to the redesignations. 21 U.S.C. § 822,
Historical and Statutory Notes: References in Text (Thompson Reuters 2015 ed.).

1 position to distribute large quantities of his employer's diet pills to persons other than the customers he
2 claimed had ordered them. *Id.* at 1348-50. The defendant argued that he was covered by Section
3 822(c)(1) because he was an employee of a registered drug manufacturer who was distributing the diet
4 pills in the usual course of his employment and further claimed that Section 841(a)(1) was inapplicable
5 to him because of his Section 822(c) exemption. *Id.* at 1350. The Eight Circuit disagreed. *Id.* The
6 court of appeals first concluded that the evidence allowed the jury to conclude that the defendant was
7 not, in fact, acting within the usual course of business and was instead diverting his employer's diet pills
8 from legitimate business channels of distribution. *Id.* But the court then held that neither the
9 employer's authorization nor Section 822(c) "legitimizes illegal activities." *Id.* The court explained
10 that Section 822(c) is only "an exemption to registration" and "does not attempt to make criminal
11 conduct lawful under any circumstances." *Id.* at 1353. The Court should reach the same conclusion
12 here.

13 *b. The defendants' interpretation of Section 822(c) undermines the goals of the CSA.*

14 In their motion, the defendants acknowledge that "[t]he main objectives of the CSA were to
15 conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." Def.
16 Mot. 13 (quoting *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005)). According to the defendants, however,
17 Congress set aside these primary objectives in drafting Section 822(c) in the interest of furthering of a
18 long-term, apparently overarching goal of protecting common carriers from criminal liability "[i]n order
19 to avoid obstructing common carriers' vital function of facilitating commerce." Def. Mot. 2; *see id.* at
20 13-16. The defendants provide two bases for this sweeping claim, but neither is persuasive.

21 First, the defendants claim that Congress enacted four drug-control statutes between 1914 and
22 1970 that contained common-carrier exemptions, and they contend that these statutes reflect
23 "Congress's consistent judgment" that common carriers should not be part of regulatory schemes for
24 pharmaceuticals. Def. Mot. 14-15. Of course, two of these four statutes are the CSA and FDCA, and as
25 discussed herein, neither exempts common carriers from criminal liability. The other two statutes are
26 the Harrison Act, which imposed registration requirements on manufacturers and distributors of opiates
27 and regulated the issuance of prescriptions, and the Drug Abuse Control Amendments of 1965, which
28

1 similarly required manufacturers and certain distributors of depressant and stimulant drugs to register
2 under the statute. Pub. L. No. 63-233, 38 Stat. 785 (1914) (“Harrison Act”); Pub. L. No. 89-74, 79 Stat.
3 226 (1965) (“Drug Abuse Control Amendments”); *see Gonzales*, 545 U.S. at 10 (discussing Harrison
4 Act). Both statutes included exemptions for common carriers, but like Section 822(c), they amounted to
5 exemptions from the statutes’ registration requirements. *See* Harrison Act, § 8, 38 Stat. 785, 789; Drug
6 Abuse Control Amendments, § 511(b), 79 Stat. 226, 229. Specifically, the statutes granted registered
7 persons and certain unregistered persons, including common carriers, the same authorization to engage
8 in certain activities. *See* Harrison Act, § 8, 38 Stat. 785, 789 (possession of opiates); Drug Abuse
9 Control Amendments, § 511(b), 79 Stat. 226, 229 (sale, delivery, or disposal of depressant or stimulant
10 drugs). But neither statute created a unique exclusion for common carriers that authorized them to
11 engage in conduct that would have been off-limits to registered distributors. *See id.* Furthermore, these
12 statutes represented only a small fraction of the drug-control statutes that Congress passed during this
13 period. *See* H.R. Rep. No. 91-1444, available at 1970 U.S.C.C.A.N. 4566, 4571 (“Since 1914 the
14 Congress has enacted more than 50 pieces of legislation relating to control and diversion, from
15 legitimate channels, of those drugs referred to as narcotics and dangerous drugs.”) (cited by Def. Mot.
16 15). Accordingly, these statutes are not persuasive evidence that Congress has a longstanding and
17 overriding concern for protecting common carriers that has consistently trumped its desire to regulate
18 and control the distribution of narcotics and dangerous drugs.

19 Second, the defendants identify a handful of common-carrier exemptions scattered throughout
20 the United States Code and argue that these provisions reveal a “broader scheme” to ensure that
21 common carriers are “free to carry out their vital societal function without fear that they will be
22 criminally liable for the contents of packages tendered for carriage.” Def. Mot. 15; *see id.* at 15-16. But
23 of course there are also statutory provisions that do not exempt common carriers from prohibitions that
24 might apply to them as a result of their transportation and delivery of packages. *See, e.g.*, 18 U.S.C.
25 § 1264 (statute prohibiting officer, agent, or employee of common carrier from knowingly misdelivering
26 alcoholic beverages); 18 U.S.C. § 1341 (mail-fraud statute); 18 U.S.C. § 1462 (statute prohibiting
27 importation or transportation of obscene matters); 18 U.S.C. § 2252A(a) (child-pornography distribution
28

statute). For example, 49 U.S.C. § 80302 provides that “[a] person may not— (1) transport contraband in an aircraft, vehicle, or vessel; (2) conceal or possess contraband on an aircraft, vehicle, or vessel; or (3) use an aircraft, vehicle, or vessel to facilitate the transportation, concealment, receipt, possession, purchase, sale, exchange, or giving away of contraband.” 49 U.S.C. § 80302(b). For purposes of this section, “contraband” includes a narcotic drug that “is acquired, possessed, sold, transferred, or offered for sale” in violation of the laws of the United States. 49 U.S.C. § 80302(a)(1)(B). This statute includes no exemption for common carriers and therefore undercuts the defendants’ claim that Congress has demonstrated a “consistent intent to exclude common carriers from participation in the regulatory schemes governing the distribution of goods, particularly pharmaceuticals.” Def. Mot. 16.

In arguing that Congress has adopted a “broad scheme” to protect common carriers, the defendants suggest that Congress wanted to protect common carriers from prosecution for unwittingly furthering their customers’ criminal conduct. *See* Def. Mot. 2, 15. The defendants further argue that Congress sought to ensure that common carriers are under no obligation to monitor packages for controlled substances. *See* Def. Mot. 2, 13, 15-16. Neither of these objectives is furthered by a rule that allows common carriers to knowingly distribute controlled substances, and yet the defendants argue that the primary purpose of Section 822(c) is to protect carriers from prosecution for such knowing conduct. *See* Def. Mot. 27-28. The defendants identify no reason why Congress might have been inclined to create an exemption that would give common carriers a free pass to knowingly distribute cocaine, heroin, and methamphetamine as long as they do so in the usual course of business. Nor do they explain why Congress would have been inclined to extend the same broad exemption to the agents and employees of CSA registrants and to the ultimate users of controlled substances.

In short, the defendants’ interpretation of Section 822(c) is inconsistent with the text and structure of the CSA, with Supreme Court precedent, and with the core purpose the CSA. Accordingly, the Court should hold that when Section 822(c) states that persons exempted from the CSA’s registration requirements “may lawfully possess any controlled substance . . . under this subchapter,” this language unambiguously provides that common carriers may possess controlled substances in the usual course of business only to the extent that such possession is otherwise lawful under the CSA.

1 2. In any event, the superseding indictment alleges that the defendants acted outside the
2 usual course of business when they committed the charged offenses, which places them
3 outside the scope of any Section 822(c) exemption.

4 For the reasons set forth in the previous subsection, Section 822(c) does not provide common
5 carriers the authority to engage in conduct that would otherwise be illegal under the CSA. But even if
6 Section 822(c)(2) did grant common carriers such authority, the defendants would still not be entitled to
7 dismissal based on this exemption because the superseding indictment alleges that their conduct falls
8 outside of its scope.

9 a. *The superseding indictment specifically alleges that the defendants acted outside*
10 *“the usual course of business” and departed from their “usual business*
11 *practices” when they committed the charged conduct.*

12 As an initial matter, the superseding indictment did not need to allege the inapplicability of
13 Section 822(c)(2). The CSA expressly provides that:

14 It shall not be necessary for the United States to negative any exemption
15 or exception set forth in this subchapter in any complaint, information,
16 indictment, or other pleading or in any trial, hearing, or other proceeding
17 under this subchapter, and the burden of going forward with the evidence
18 with respect to any such exemption or exception shall be upon the person
19 claiming its benefit.

20 21 U.S.C. § 885(a)(1); *cf. United States v. Miranda*, 494 F.2d 783, 786 (5th Cir. 1974) (rejecting
21 defendant’s claim that CSA indictment must aver that he was not one of the persons described in Section
22 822(c)). Under this provision, a defendant bears the initial burden of presenting a claim that he falls
23 within a CSA exemption, and then the burden shifts to the government to prove beyond a reasonable
24 doubt that the exemption does not apply. *Rosenberg*, 515 F.2d at 199. For example, if the defendants
25 seek to invoke Section 822(c)(2) as an exemption from liability at trial, each defendant will bear the
26 burden of making an initial showing that, among other things, it is “[a] common or contract carrier or
27 warehouseman, or an employee thereof.” 21 U.S.C. § 822(c)(2). The defendants’ motion suggests that
28 FedEx Express will be able to carry this initial burden, but it is less clear that defendants FedEx
Corporation and FedEx Corporate Services, Inc., will be able to do so.³ *See* Def. Mot. 4-6, 22.

³ The defendants’ motion alleges that FedEx Express maintains an Air Carrier Certificate from the Federal Aviation Administration that authorizes it to “operate as an air carrier and conduct common carriage operations” and that FedEx Express transports over four million packages a day. Def. Mot. 5; *see also id.* at 22. The defendants do not make comparable allegations about FedEx Corporation and U.S. OPP. TO MOT. TO DISMISS
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1 In any event, the Court need not decide whether an indictment must address the inapplicability of
2 Section 822(c)(2) because the allegations in the defendants’ superseding indictment do, in fact, negative
3 this exemption. By its terms, Section 822(c)(2) applies only to a common carrier who possesses the
4 relevant controlled substance “in the usual course of his business or employment.” 21 U.S.C. §
5 822(c)(2). The superseding indictment alleges that the defendants’ conduct in this case did not satisfy
6 this requirement. In particular, the superseding indictment alleges that the defendants “did not ship
7 contraband, including illegal drugs, in the usual course of business” and that they departed from their
8 “usual business practices” in order to participate in and facilitate the unlawful sales of controlled
9 substances described in the indictment. Super. Ind. ¶¶ 39, 84. For purposes of the defendants’ motion,
10 the Court must accept the truth of these allegations when evaluating the potential applicability of Section
11 822(c)(2) and therefore must assume that the defendants’ conduct in this case occurred outside the usual
12 course of their business. See *Lyle*, 742 F.3d at 436. Because this circumstance places the defendants
13 outside the scope of any Section 822(c)(2) exemption, the defendants cannot show that Section
14 822(c)(2) applies on the face of the indictment and therefore are not entitled to dismissal of any counts
15 based on this provision.

16 *b. The defendants cannot show that, as a matter of law, they were acting in the usual*
17 *course of their business.*

18 In an attempt to escape the plain language of the indictment, the defendants ask the Court to hold
19 that, as a matter of law, a common carrier always acts “in the usual course of [its] business” when it
20 transports and delivers goods for the general public. Def. Mot. 17. But the defendants identify no court
21 that has so held. See *id.* at 17-20.

22 Indeed, the courts that have considered the meaning of “the usual course of his business” in the
23 context of Section 822(c) have concluded that this language means that the unregistered person must be
24 participating in “the legitimate distribution chain” for the relevant controlled substance. See *Hill*, 589
25 F.2d at 1350 (explaining that the government proved that the defendant was not acting in the usual
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27 FedEx Corporate Services, Inc. See *id.* at 4-6, 22. Instead, these two defendants suggest that they may
28 attempt to carry their burden by pointing to allegations in the superseding indictment. See Def. Mot. 4-
5, 11 n.3. The United States reserves the right to challenge this position.

1 course of business in part by demonstrating that the relevant drug shipments “were diverted from
2 legitimate business channels of distribution.”); *United States v. Smith*, 141 Fed. Appx. 83, 86 (4th Cir.
3 2005) (“To qualify under the employee or agent exception to registration under § 822, the person must
4 be employed in the ‘legitimate distribution chain’ of the controlled substance.”); *Miranda*, 494 F.2d at
5 786 (“Employees of registered distributors, common carriers, and ultimate users are exempted from
6 registration if their activities are within the legitimate distribution chain.”). This interpretation comports
7 with Congress’s stated intent that the CSA “make[] transactions outside the legitimate distribution chain
8 illegal.” *Moore*, 423 U.S. at 135 (quoting H.R. Rep. No. 91-1444 at 3, available at 1970 U.S.C.C.A.N.
9 4569); *see also id.* at 141 (explaining that a registration under the CSA “authorizes transactions within
10 ‘the legitimate distribution chain’ and makes all others illegal”); *Rosenberg*, 515 F.2d at 193 (explaining
11 that Congress, in enacting the CSA, “was concerned with the diversion of drugs out of legitimate
12 channels of distribution”); *United States v. Vamos*, 797 F.2d 1146, 1152 (2d Cir. 1986) (“Section 841(a)
13 . . . is clearly directed at halting distribution outside the scope of a legitimate chain of possession.”).

14 By contrast, under the defendants’ proposed interpretation of “the usual course of his business,”
15 Section 822(c)(2) would apply to common carriers that intentionally facilitate drug transactions outside
16 the legitimate distribution chain, as long as those carriers do so by providing shipping services to the
17 public. In other words, the defendants could elect to distribute cocaine for a Mexican drug cartel and
18 still reap the benefits of Section 822(c)(2) because they would be providing shipping services to the
19 general public, including their co-conspirators. Conversely, a Mexican drug cartel could solve its legal
20 problems and avoid prosecution in the United States by offering to transport goods for the general public
21 along with its shipments of cocaine. And because the “usual course of his business or employment”
22 language also appears in Section 822(c)(1), a registered pharmaceutical distributor could instruct its
23 sales representative to start distributing heroin, and the employee would be immune from prosecution
24 for this conduct because it was his job to distribute controlled substances. *See* 21 U.S.C. § 822(c)(1).
25 All of these outcomes would plainly undermine the CSA’s goal of “mak[ing] transactions outside the
26 legitimate distribution chain illegal.” *Moore*, 423 U.S. at 135 (quoting H.R. Rep. No. 91-1444 at 3,
27 available at 1970 U.S.C.C.A.N. 4569).

1 The defendants argue that two CSA predecessor statutes – the 1914 Harrison Act and the Drug
2 Abuse Control Amendments of 1965 – support their interpretation of “the usual course of his business.”
3 *See* Def. Mot. 19. As discussed in Part B.1.b, *supra*, these statutes exempted common carriers from
4 statutory registration requirements but did not authorize common carriers to engage in conduct that
5 would have been off-limits to registered distributors. The Harrison Act specified that its registration
6 exemption applied to “common carriers engaged in transporting . . . drugs,” and the Drug Abuse Control
7 Amendments stated that its registration exemption applied to a common carrier whose possession of a
8 drug was “in the usual course of his business or employment as such.” Harrison Act, § 8, 38 Stat. 785,
9 789; Drug Abuse Control Amendments, § 511(b), 79 Stat. 226, 229. Neither of these provisions
10 suggested that a carrier’s “usual course of business” encompassed all of its shipping activities, including
11 its knowing possession and distribution of illegal drugs. Furthermore, as the Supreme Court explained
12 in *Moore*, the CSA “was intended to ‘strengthen’ rather than to weaken, ‘existing law enforcement
13 authority in the field of drug abuse.’” 423 U.S. at 132 (quoting 84 Stat. 1236 (1970) (preamble)); *see*
14 *also Gonzales*, 545 U.S. at 11-12 (recognizing that “federal drug policy underwent a significant
15 transformation” in 1970, in part because of the enactment of the CSA). In other words, the scope of
16 criminal liability under the CSA is broader than its predecessor statutes. Accordingly, even if the
17 Harrison Act and the Drug Control Abuse Amendments did define a common carrier’s “usual course of
18 business” to encompass its knowing shipment of illegal drugs, the defendants could not rely on these
19 predecessor statutes to expand the plain meaning of “the usual course of his business” in the CSA.

20 The civil cases that the defendants invoke are similarly unhelpful to their position. *See* Def. Mot.
21 19-20. Only one of these cases discusses a common carrier, and it does not address whether the
22 common carrier – an airline – acted in the usual course of business when it moved the plaintiffs’ luggage
23 from their point of origin to their destination. *See Hanni v. American Airlines*, 2010 WL 289297, *14-
24 *15 (N.D. Cal. 2010). Rather, the court simply noted that “a common carrier incurs no liability for
25 conversion in receiving and forwarding goods tendered in the usual course of business” before holding
26 that the common carrier was entitled to summary judgment on the plaintiffs’ conversion claim because it
27 had not exercised dominion, asserted ownership, or prevented the plaintiffs from asserting ownership of
28

1 their luggage. *Id.* The defendants’ other two civil cases are even less relevant because neither involves
2 a common carrier, much less a question about whether and when a common carrier acts in the usual
3 course of business. *See First National Bank of Manitowoc v. Cincinnati Ins. Co.*, 485 F.3d 971, 978-79
4 (7th Cir. 2007) (addressing the meaning of “the usual course of business” in a bank’s insurance
5 agreement); *Miller v. Carrington Mortgage Services*, 2013 WL 5291939, at *2 (N.D. Cal. 2013)
6 (applying bankruptcy law that authorizes a trustee to enter into transactions “in the ordinary course of
7 business”).

8 For all of these reasons, the defendants have offered no meaningful support for their claim that,
9 as a matter of law, a common carrier possesses a controlled substance “in the usual course of his
10 business or employment” whenever the carrier transports the substance for a customer, even if the
11 carrier does so outside the legitimate distribution chain for the drug. The Court therefore should reject
12 the defendants’ claim that Section 822(c)(2) applies to them on the face of the indictment and should
13 instead conclude that the indictment sufficiently alleges the inapplicability of this exception.
14 Accordingly, even if Section 822(c)(2) created a complete exemption from criminal liability under the
15 CSA, as the defendants now claim, the defendants would not be entitled to dismissal of any counts based
16 on this provision.

17 c. *The defendants’ departure from their own individual business practices is*
18 *relevant to whether they were acting in the usual course of business.*

19 For the reasons set forth in the previous subsections, the superseding indictment sufficiently
20 alleges that Section 822(c)(2) will not apply in this case because the defendants were not acting “in the
21 usual course of [their] business.” 21 U.S.C. § 822(c)(2). Because these arguments do not rely on the
22 superseding indictment’s allegations that the defendants established special policies that applied only to
23 Internet pharmacies, Super. Ind. ¶¶ 8-21, the Court need not decide whether those allegations would also
24 be sufficient to negative Section 822(c)(2) by showing that the defendants were not acting in the usual
25 course of their business. At trial, however, evidence that the defendants departed from their own
26 internal policies would shed light on whether they were acting in the usual course of business for
27 purposes of Section 822(c)(2). For example, the defendants’ internal policies and practices were
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presumably consistent with the usual practices of their industry, and so the defendants' decision to stray from their internal standards is probative of whether they were also straying from industry standards.⁴

3. The distribution counts (Counts 2-10, 14 & 15) properly state offenses under the CSA.

Counts 2 through 10, 14, and 15 charge the defendants with violating 21 U.S.C. § 841(a)(1), which makes it unlawful for “any person knowingly or intentionally . . . to . . . distribute . . . or possess with intent to . . . distribute . . . a controlled substance.” *Id.*; Super. Ind. ¶¶ 41-42, 88-89. For all of the reasons set forth in the previous subsections, Section 822(c) does not exempt the defendants from prosecution for such conduct. Furthermore, Section 822(c) does not apply to these distribution counts because it provides only that certain unregistered persons may “lawfully possess” controlled substances. In other words, as the Supreme Court expressly stated in *Moore*, “nonregistrants are barred from making any distributions whatsoever.” 423 U.S. at 133 n.10. Accordingly, even if Section 822(c) somehow immunized common carriers from criminal liability under the CSA for possessing controlled substances, it does not shield the defendants from prosecution for distributing them.

The text of Section 822 confirms that Congress intentionally chose to limit the scope of Section 822(c) to possession. Specifically, Section 822(b) authorizes CSA registrants to “possess, manufacture, distribute, or dispense” controlled substances to the extent authorized by their registration and the other provisions of the CSA, but Section 822(c) provides only that non-registrants may “lawfully possess” controlled substances, without mentioning manufacturing, distribution, or dispensing. *Compare* 21 U.S.C. § 822(b) *with* 21 U.S.C. § 822(c); *cf. Stubblefield v. Gonzales*, 150 Fed. Appx. 630, 632 (9th Cir. 2005) (concluding that Section 822(c)(3) authorizes ultimate users only to lawfully possess controlled substances for certain specified purposes and does not permit them to manufacture controlled substances). As the Supreme Court has explained, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

⁴ The United States does not contend that “FedEx may define for itself the scope of the ‘usual course of business’ of a common carrier.” Def. Mot. 24. Rather, as with the CSA’s exception for physicians, a common carrier’s “usual course of business” should be determined by looking at the standards of the industry. *See Feingold*, 454 F.3d at 1004 (“[A] physician remains criminally liable when he ceases to distribute or dispense controlled substances as a medical professional, and acts instead as a ‘pusher.’”).

1 Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Bates v. United*
2 *States*, 522 U.S. 23, 29-30 (1997). Section 822(b)’s reference to distribution therefore demonstrates that
3 Congress intentionally chose to exclude distribution-related activities from the scope of Section 822(c).
4 And because Section 822(b) refers in the alternative to the possession, distribution, and dispensing of
5 controlled substances, Section 822(c)’s reference to possession plainly does not encompass all of these
6 activities, as the defendants now claim. *See* Def. Mot. 29-31.

7 Furthermore, interpreting the word “possess” in Section 822(c) to exclude distribution would not
8 render this provision “meaningless.” Def. Mot. 29. As discussed in Part B.1, *supra*, Section 822(c)
9 merely creates an exception to the CSA’s registration requirements and does not authorize common
10 carriers to engage in any conduct that would otherwise be unlawful under the CSA. But even if Section
11 822(c) created an exemption from criminal liability, as the defendants claim, Congress could reasonably
12 decide to limit the scope of this exemption to possession alone, rather than extending it to distribution.
13 Indeed, if this theoretical exemption applied only to possession, rather than possession and distribution,
14 then Section 822(c) would allow a common carrier to avoid prosecution if, in the course of transporting
15 a package, it discovered that the package contained an illegal controlled substance.⁵ At that point, the
16 common carrier would knowingly be in possession of the substance, but not by choice. In those
17 circumstances, Congress might plausibly conclude that the carrier should not be prosecuted for its
18 knowing but inadvertent possession. Congress could also reasonably conclude, however, that once the
19 common carrier discovered the controlled substance, it should alert law enforcement, rather than
20 delivering the package to its final destination. This reasoning would explain why, even under the
21 defendants’ flawed interpretation of the statute, Congress might limit the scope of any Section 822(c)
22 exemption to possession, rather than expanding it to cover distribution.

23 For all of these reasons, Section 822(c)’s reference to “possess” means “possess,” not “possess
24 and distribute,” and because this term is unambiguous, the rule of lenity does not apply. *See Backlund*,
25 689 F.3d at 997-98. Accordingly, even if Section 822(c) exempted the defendants from any criminal
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27 ⁵ This rationale would apply equally to employees whose work requires them to distribute and
28 dispense controlled substances. *See* Def. Mot. 30-31 (discussing such persons).

1 liability for possessing controlled substances in the usual course of their business, the defendants would
2 not be entitled to dismissal of Counts 2 through 10, 14, and 15 because these counts charge the
3 defendants with distribution, rather than mere possession.

4 4. The CSA conspiracy charges (Counts 1 & 13) properly state offenses under the CSA.

5 Counts 1 and 13 charge the defendants with violating 21 U.S.C. § 846, which makes it unlawful
6 to conspire to distribute and to possess with intent to distribute controlled substances in violation of,
7 *inter alia*, 21 U.S.C. § 841(a)(1). Super. Ind. ¶¶ 22-40, 70-87. For all of the reasons set forth in the
8 previous subsections, Section 822(c) does not exempt the defendants from prosecution for such conduct.
9 But even if Section 822(c) somehow authorized the defendants to knowingly engage in the unlawful
10 distribution of controlled substances, the defendants would still not be entitled to dismissal of Counts 1
11 and 13 for two reasons. First, nothing in Section 822(c) suggests that a common carrier may conspire
12 with others to violate the CSA. Second, as the defendants acknowledge, Counts 1 and 13 charge the
13 defendants with agreeing to participate in and facilitate their co-conspirator Internet pharmacies’
14 unlawful distribution of controlled substances. Super. Ind. ¶¶ 38-39, 83-84; *see* Def. Mot. 32. Section
15 822(c) plainly does not exclude Internet pharmacies from the reach of the CSA or authorize such
16 pharmacies to distribute controlled substances outside the usual course of professional practice and
17 without a legitimate medical purpose. *See United States v. Bansal*, 663 F.3d 634, 665 (3d Cir. 2011)
18 (upholding § 846 conviction based on conspiracy to distribute drugs without a valid prescription via an
19 Internet pharmacy). Furthermore, the defendants may be liable for conspiring to facilitate the Internet
20 pharmacies’ unlawful distribution even if the defendants would be exempt from prosecution for their
21 own distribution of the same controlled substances. *See Salinas v. United States*, 522 U.S. 52, 64 (1997)
22 (explaining that a person “may conspire for the commission of a crime by a third person” and “may be
23 liable for conspiracy even though he was incapable of committing the substantive offense”).

24 The Ninth Circuit applied this rule in *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008), a
25 RICO conspiracy case in which the indictment charged the defendant with conspiring to facilitate the
26 commission of the crime of contraband cigarette trafficking. *Id.* at 1041-42. Although the defendant
27 could not be charged with the substantive offense of contraband cigarette trafficking because of his
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1 tribal status, the Ninth Circuit concluded that he could nonetheless be prosecuted for a RICO conspiracy
2 in which the racketeering activity was contraband cigarette trafficking. *Id.* at 1042. In so doing, the
3 court of appeals explained that “a conspiracy may exist and be punished whether or not the substantive
4 crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
5 *Id.* The same reasoning applies here.

6 Although the defendants claim that any Section 822(c) exemption must shield them from
7 criminal liability for conspiring to violate the CSA, the two cases on which they rely do not support this
8 contention. *See* Def. Mot. 32-33. The first case, *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012), holds that
9 grand jury witnesses have absolute immunity from any § 1983 claim based on their testimony. *Id.* at
10 1506. The Supreme Court further held that this immunity must extend to claims that a grand jury
11 witness conspired to present false testimony because otherwise “a criminal defendant turned civil
12 plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions
13 themselves.” *Id.* The Ninth Circuit reached a similar conclusion in *Franklin v. Terr*, 201 F.3d 1098 (9th
14 Cir. 2000), about the absolute immunity granted to trial witnesses for their testimony. *See id.* at 1101-
15 02. Both of these cases base their holdings on the specific concerns that motivate absolute witness
16 immunity, which include “the policy of protecting the judicial process” and the need “to assure that
17 judges, advocates, and witnesses can perform their respective functions without harassment or
18 intimidation.” *Id.* at 1101; *see also Rehberg*, 132 S. Ct. at 1506. Needless to say, these concerns are not
19 present when a common carrier conspires to illegally distribute controlled substances, and therefore the
20 holdings of *Rehberg* and *Franklin* cannot stretch to encompass this conduct.

21 For all of these reasons, the Court should deny the defendants’ motion to dismiss the CSA
22 conspiracy counts.

23 **C. The Money-Laundering Conspiracy Charges (Counts 12, 17 & 18) Properly State Offenses**
24 **Under 18 U.S.C. § 1956.**

25 Counts 12, 17, and 18 charged the defendants with violating 18 U.S.C. § 1956(a)(1)(A)(i) and
26 (h), which make it unlawful to conspire to conduct financial transactions that involve the proceeds of
27 specified illegal activity, knowing that the property involved in the transactions represents the proceeds
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1 of some form of illegal activity, with the intent to promote the carrying on of the specified unlawful
2 activity.⁶ Super. Ind. ¶¶ 63, 108, 115. In support of these charges, the superseding indictment alleged
3 that the financial transactions at the heart of these three conspiracies involved the proceeds of “the
4 possession with intent to distribute and distribution of controlled substances outside the usual course of
5 professional practice and not for a legitimate medical purpose, knowing and intending that the
6 possession with intent to distribute and distribution was outside the usual course of professional practice
7 and not for a legitimate medical purpose,” in violation of 21 U.S.C. § 841(a). *Id.* ¶¶ 63, 108, 115.

8 For all of the reasons set forth in the previous sections, Section 822(c) does not exempt the
9 defendants from criminal liability under the CSA. But even if Section 822(c) somehow authorized the
10 defendants to engage in conduct that would otherwise be illegal under the CSA, the defendants would
11 still not be entitled to dismissal of the money-laundering conspiracy counts for two reasons.

12 First, a money-laundering charge does not require the government to prove that the defendants
13 themselves participated in the specified unlawful activity that generated the laundered proceeds. *See*
14 *United States v. Golb*, 69 F.3d 1417, 1429 (9th Cir. 1995). Accordingly, even if Section 822(c)(2)
15 somehow exempted the defendants from criminal liability under the CSA, it would not authorize the
16 defendants to launder the proceeds of activity that was unlawful under the CSA.

17 Second, in this case, the superseding indictment alleged that the proceeds the defendants
18 conspired to launder consisted of payments that its co-conspirator Internet pharmacies had made to the
19 defendants and that represented the proceeds of those pharmacies’ illegal sale of controlled substances.
20 Super. Ind. ¶¶ 67-68, 111-12, 118-19. Accordingly, even if Section 822(c)(2) somehow authorized the
21 defendants to launder the proceeds of their own drug activities, it would not entitle them to conspire to
22 launder the proceeds of the pharmacies’ illegal drug sales because those co-conspirators are still subject
23 to the restrictions of the CSA. *See Salinas*, 522 U.S. at 64 (explaining that a person “may conspire for
24 the commission of a crime by a third person” and “may be liable for conspiracy even though he was
25 incapable of committing the substantive offense”).

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27 ⁶ Because these charges require that the defendants intended to promote the underlying illegal
28 activity, they do not subject the defendants to liability “simply for accepting payment for the
performance of its business.” Def. Mot. 33.

1 For all of these reasons, the Court should deny the defendants' motion to dismiss the money-
2 laundering conspiracy counts.

3 **D. The FDCA Conspiracy Charges (Counts 11 & 16) Properly State Offenses Under the**
4 **FDCA.**

5 Counts 11 and 16 charged the defendants with violating 18 U.S.C. § 371 by conspiring with
6 certain Internet pharmacies to violate the FDCA by distributing and dispensing prescription drugs to
7 consumers without valid prescriptions from licensed practitioners, thereby causing the drugs to be
8 misbranded while held for sale after their shipment. Super. Ind. ¶¶ 44, 90. In support of these charges,
9 the superseding indictment alleged that the co-conspirator Internet pharmacies falsely and fraudulently
10 represented to customers and government agencies that they were lawfully distributing prescription
11 drugs pursuant to valid prescriptions. *Id.* ¶¶ 44-47, 91-94. The defendants argue that the Court should
12 dismiss these counts because, in their view, the FDCA shields common carriers from criminal liability
13 for conduct that would otherwise violate the statute. The defendants base this claim on 21 U.S.C.
14 § 373(a), which provides that “carriers shall not be subject to the other provisions of this chapter by
15 reason of their receipt, carriage, holding, or delivery of . . . drugs . . . in the usual course of business as
16 carriers.” For several reasons, Section 373(a) does not exempt the defendants from criminal liability for
17 the conduct charged in the superseding indictment and therefore does not warrant dismissal of Counts 11
18 and 16.

19 First, the defendants identify no court that has concluded that Section 373(a) exempts all
20 “carriers,” including common carriers, from any criminal liability under the FDCA, and the government
21 is aware of no opinion that so holds. Indeed, such an interpretation would be inconsistent with the
22 FDCA statutory regime, which “is designed primarily to protect the health and safety of the public at
23 large,” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014), and “to bolster consumer
24 protection against harmful products.” *Wyeth v. Levine*, 555 U.S. 555, 574 (2009). This objective would
25 be thwarted if common carriers could distribute misbranded drugs with impunity as long as they did so
26 in the usual course of business. Accordingly, for many of the same reasons discussed in Part B.1, *supra*,

1 the Court should conclude that Section 373(a) does not authorize carriers to knowingly distribute and
2 dispense misbranded drugs.

3 Second, even if Section 373(a) does create an exemption from all criminal liability under FDCA,
4 the defendants are not entitled to dismissal of Counts 11 and 16 because the superseding indictment
5 sufficiently alleges that this exemption does not apply to the defendants here. Specifically, Section
6 373(a) applies only to carriers who receive, carry, hold, or deliver misbranded drugs “in the usual course
7 of business as carriers.” 21 U.S.C. § 373(a). The United States agrees with the defendants that this term
8 has the same meaning as “the usual course of his business” in Section 822(c). *See* Def. Mot. 18.
9 Accordingly, for the reasons set forth in Part B.2, *supra*, the superseding indictment sufficiently alleges
10 that Counts 11 and 16 are based on conduct that the defendants engaged in outside the usual course of
11 business, and the defendants cannot show that these allegations are wrong as a matter of law. *See, e.g.,*
12 *Super. Ind.* ¶¶ 8-11, 39, 43, 84, 90.

13 The FDA policy statement on which the defendants rely does not suggest otherwise. This policy
14 statement, which discusses Section 373(a), suggests that carriers do not act “in their usual course of
15 business as carriers” when they perform “operations or functions which are outside the normal duties of
16 a carrier.” Def. Mot. 17-18 (quoting FDA Compliance Policy Guide § 100.500 (1989)). But the policy
17 statement does not explain what constitutes a carrier’s “normal duties,” much less provide that those
18 duties include knowingly transporting illegal drugs for customers. In other words, to the extent that this
19 policy statement can be read to define “the usual course of business,” it simply replaces one question of
20 fact (whether a carrier acted in the usual course of business) with another (whether the carrier was
21 performing “the normal duties of a carrier”). *Cf. In re Straightline Investments, Inc.*, 525 F.3d 870, 879
22 (9th Cir. 2008) (“A determination of whether a transaction falls outside the ordinary course of business
23 is a question of fact that depends on the nature of industry practice.”). The Court may not resolve such
24 factual questions when ruling on a motion to dismiss. *See Boren*, 278 F.3d at 914 (“A motion to dismiss
25 the indictment cannot be used as a device for a summary trial of the evidence.”).

26 Finally, even if Section 373(a) authorized the defendants to distribute misbranded drugs with the
27 intent to defraud, the defendants would still not be entitled to dismissal of Counts 11 and 16 because
28

nothing in Section 373(a) suggests that a common carrier may conspire with others to violate the FDCA. In addition, these counts charge conspiracies whose goal was to facilitate the co-conspirator Internet pharmacies' distribution of misbranded drugs. Super Ind. ¶¶ 44-47, 91-94. Section 373(a) does not exclude Internet pharmacies from the reach of the FDCA or authorize such pharmacies to distribute misbranded drugs. 21 U.S.C. § 373(a); *see also United States v. Smith*, 573 F.3d 639, 650-52 (8th Cir. 2009) (holding that the FDCA applies to Internet pharmacy distributing drugs that were misbranded because they were not issued pursuant to a "valid" prescription). Accordingly, for the reasons set forth in Part B.4, *supra*, the defendants may be liable for conspiring to facilitate the Internet pharmacies' unlawful conduct even if the defendants would be exempt from prosecution if they engaged in this conduct themselves.

For all of these reasons, Section 373(a) does not exempt the defendants from criminal liability for conspiring to distribute misbranded drugs with the intent to defraud, and Counts 11 and 16 properly state offenses under 18 U.S.C. § 371. The Court should therefore deny the defendants' motion to dismiss these counts.

E. Because the Defendants Had Fair Warning That the Charged Conduct Violates the CSA and FDCA, the Fifth Amendment Does Not Require Dismissal of Any Charges.

In the alternative, the defendants argue that the superseding indictment should be dismissed because they did not have fair warning that their conduct was criminal under the CSA and FDCA. *See* Def. Mot. 35-39. A statute presents a fair-warning problem only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess at what Congress intended." *Backlund*, 689 F.3d at 997-98. In that circumstance, the rule of lenity applies and "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. at 266; *see Backlund*, 689 F.3d at 997-98. As discussed in the previous sections, however, the CSA and FDCA are unambiguous as applied to the defendants' conduct. Because the statutes therefore "give a person of ordinary intelligence fair notice that [this] conduct is forbidden," they provide the fair warning that the Fifth Amendment requires. *United States v. Harriss*, 347 U.S. 612, 617 (1954). Indeed, the defendants should not be surprised to

1 learn that they cannot intentionally deliver cocaine for a Mexican drug cartel. In fact, the en banc Ninth
2 Circuit has specifically alerted FedEx to the fact that it could be prosecuted for knowingly distributing
3 illegal drugs. *See United States v. Heredia*, 483 F.3d 913, 920 n.10 (9th Cir. 2007) (en banc) (“[I]f a
4 particular package leaks a white powder or gives any other particularized and unmistakable indication
5 that it contains contraband, and the carrier fails to investigate, it may be held liable – and properly so.”).

6 Finally, there is no merit to the defendants’ suggestion that this Court would violate due process
7 if it interprets Sections 822(c) and 373(a) in a way that subjects the defendants to criminal liability under
8 the CSA and FDCA. *See* Def. Mot. 39. As an initial matter, this Court would simply be following a
9 trail blazed by earlier decisions, including the Supreme Court’s decision in *Moore* and the Eighth
10 Circuit’s decision in *Hill*.⁷ *See* Part B.1, *supra*. But even if this Court were the first to approach the
11 issues raised by the defendants’ motion, its decision would not retroactively subject the defendants to
12 prosecution without fair warning. Rather, the Court’s interpretation of Sections 822(c) and 373(a)
13 would be grounded in the text, structure, purposes, and history of the CSA and FDCA, all of which have
14 given the defendants’ ample notice of their criminal liability. Accordingly, the Court’s ruling would not
15 amount to “[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, [that]
16 violates the federal due process right to fair warning of what constitutes criminal conduct.” *Clark v.*
17 *Brown*, 450 F.3d 898, 911 (9th Cir. 2006).

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27 ⁷ These cases belie the defendants’ claim that “there are no judicial decisions . . . that would
28 have given fair warning to FedEx that its transportation of pharmaceuticals could give rise to criminal
liability.” Def. Mot. 39.

1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court should deny the defendants' motion to dismiss in its
3 entirety.

4 DATED: April 22, 2015

Respectfully Submitted:

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7 /s

8

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